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Via Federal eRulemaking Portal (Regulations.gov)
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1000 Independence Avenue SW
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RE: Significant Adverse Comment to Direct Final Rule Rescinding Regulation Related to Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance (DOE-HQ-2025-0016)

Dear Mr. Taggart:

Signatory States California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin provide comment on the Department of Energy ("DOE") Direct Final Rule, published at 90 Fed. Reg. 20,786 (May 16, 2025) (to be codified at 10 C.F.R. pt. 1042), Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance ("DFR"). The DFR rescinds, effective immediately, a key provision of longstanding Title IX rules governing recipients' obligations to effectively accommodate students in athletic programs and activities regardless of sex. Specifically, the DFR eliminates the provision of 10 C.F.R. § 1042.450 that requires recipients to allow students to try out for single-sex sports teams (except contact sports) that are designated for the other sex where there is no parallel team for members of their sex, and athletic opportunities for members of the excluded sex have been limited ("the Tryout Rule.").

Signatory States oppose the rescission of the Tryout Rule on both procedural and substantive grounds. First, such a significant regulatory change is inappropriate to promulgate though a DFR, a process reserved for noncontroversial and non-substantive changes. Second, rescission of the Tryout Rule is arbitrary and capricious because it would result in fewer, not more, opportunities for female athletes whose interests it purports to protect; is premised upon no evidence and no reasoned decision-making; and fails to consider important aspects of the problem, including States' reliance interests in this longstanding regulation and its consistent application across federal agencies, the chaos and uncertainty the abrupt rescission of this longstanding rule creates, and the health and wellbeing of women and girls who enjoy increased access to athletic opportunities under the current Tryout Rule and who would lose such

opportunities without it. And third, this rescission is contrary to law and unconstitutional because it relies on impermissible stereotypes about men and women to justify maintaining and expanding sex-separate teams, and further relies on an executive order that itself is premised on unlawful stereotypes and impermissible animus.

Signatory States receive billions of dollars of education funding from DOE, operate numerous education programs and activities that receive federal funds, such as state-operated universities and community colleges, and pass federal funding through to local educational agencies. Where, as here, Signatory States have submitted a significant adverse comment, DOE is required to withdraw this DFR. 5 U.S.C. § 553(c); *see also* Section (II)(D), *infra.*

I. Background

A. The DFR's Amendment to the Title IX Athletic Participation Rule.

The DFR amends longstanding regulations governing athletic participation contained in 10 C.F.R. § 1042.450.

Subsection (b), entitled "Separate teams," specifies in its first sentence that "a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." The remainder of subsection (b), which the DFR eliminates, goes on to state:

> [W]here a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

§ 1042.450(b). In other words, the rule, as amended by the DFR, continues to permit separate teams under the circumstances specified in the first sentence of subsection (b), but no longer contains the Tryout Rule or a definition of "contact sports."

As justification for this immediate and substantive change, the DFR states, without any support for its assertions, that rules allowing for mixed participation "ignore differences between the sexes which are grounded in fundamental and incontrovertible reality while also imposing a burden on local governments and small businesses who are in the best position to determine the needs of their community and constituents." DFR, 90 Fed. Reg. at 20,786. The DFR further states that "[t]he modification also aligns the rule with Presidential direction under E.O. 14201 'Keeping Men Out of Women's Sports' which makes clear it is the policy of the United States to 'oppose male competitive participation in women's sports more broadly, as a matter of safety, fairness, dignity and truth.'" *Id.* (citing Keeping Men Out of Women's Sports, Exec. Order No. 14,201 (Feb. 5, 2025) [hereinafter "Sports Ban EO"]).

B. Regulatory History.

The current iteration of the athletics regulations, including the Tryout Rule, originates from DOE's adoption of a common Title IX rule (the "Title IX Common Rule") published by the U.S. Department of Justice ("U.S. DOJ") and based on regulations originally issued by the U.S. Department of Health, Education, and Welfare ("HEW"), the predecessor to the U.S. Department of Education ("ED"). *See generally* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858 (Aug. 30, 2000); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. 4,627 (Jan. 18, 2001). The underlying rationale for promulgating the Title IX Common Rule and HEW regulations was a desire "to promote consistent and adequate enforcement of Title IX" across federal agencies. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. at 4,627. The Title IX Common Rule and HEW regulations are supported by a strong history of "an extensive public comment process and congressional review," wherein "more than 9700 comments" were received and reviewed before the final regulation was drafted, and six days of congressional hearings took place to approve the regulation. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,859. This regulatory history of extensive public input, followed by congressional review and approval, has led courts to afford substantial deference to the HEW/ED regulations, on which the Title IX Common Rule is based. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (describing statutory process and affording deference to HEW/ED Title IX regulation on employment); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) ("The degree of deference [to the ED athletics regulations] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX."). DOE replaced its existing regulations with the Title IX Common Rule, including the Tryout Rule, in 2001. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. at 4,627.

Moreover, the athletics regulations have been the subject of substantial sub-regulatory guidance over the years, which has remained in place across numerous administrations.[1] Recipients, including state universities, state educational agencies, and local educational agencies, have relied on these longstanding regulations and the accompanying guidance in structuring their academic and athletic programs to ensure compliance with Title IX.

II. DOE's Impermissible Use of the Direct Final Rule Violates the APA.

[1] *See* Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter "1979 Policy Interpretation"]; U.S. Dep't. of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), https://www.ed.gov/laws-and-policy/higher-education-laws-and-policy/higher-education-policy/clarification-of-intercollegiate-athletics-policy-guidance-the-three-part-test [hereinafter "1996 Clarification"] (Attached as Exhibit 1); U.S. Dep't of Educ., Off. for C.R., *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/title9guidanceFinal.pdf [hereinafter "2003 Clarification"] (Attached as Exhibit 2).

DOE impermissibly seeks to circumvent notice and comment rulemaking required under the APA and rescind a longstanding regulation implementing Title IX by direct final rule, effective July 15, 2025, unless significant adverse comments are received by June 16, 2025. *See generally* DFR, 90 Fed. Reg. at 20,786.

The Administrative Conference of the United States ("ACUS"), an independent federal agency established by Congress to promote "efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies," 5 U.S.C. § 594(1), recognizes that agencies may use direct final rulemaking only where the agency for good cause finds that it is "impracticable, unnecessary, or contrary to the public interest" to undertake notice-and-comment rulemaking, and "concludes that the rule is unlikely to elicit any significant adverse comments."[2] In such circumstances, the agency should publish in the Federal Register that it is proceeding by direct final rule and explain "the basis for the agency's finding that it is unnecessary to undertake notice-and-comment rulemaking."[3]

Here, DOE violates the Administrative Procedure Act ("APA") by using the direct final rulemaking process to limit public input into the agency's rescission of the Tryout Rule. First, the narrow good cause exception to notice and comment does not apply here, nor does the agency invoke any other exception to APA rulemaking. DOE must therefore undertake notice and comment procedures for its proposed rescission. Second, the agency impermissibly raises the standard for what constitutes "significant adverse comments" that would prevent the rule from becoming effective next month. Third, DOE fails to provide adequate notice of the legal authority for this action. And fourth, the agency must commit to withdrawing the rule after receiving any significant adverse comments such as this one.

A. DOE's Rescission of the Tryout Rule Must Undergo Notice and Comment Procedures.

As an initial matter, to enact this recission, DOE must use the same notice and comment process as it would to enact new regulations. *See* 5 U.S.C. § 553. The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[T]he APA 'make[s] no distinction . . . between initial agency action and subsequent agency action

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[2] Admin. Conf. of the U.S., *Public Engagement in Agency Rulemaking Under the Good Cause Exemption* (Dec. 12, 2024), https://www.acus.gov/sites/default/files/documents/Public-Engagement-Agency-Rulemaking-Good-Cause-Exemption-Final-Recommendation.pdf [hereinafter "ACUS 2024–6"] (Attached as Exhibit 3); *see also* 5 U.S.C. § 553(b)(B); Off. of the Fed. Reg., *A Guide to the Rulemaking Process* 9, https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf (last visited June 9, 2025) (direct final rulemaking is appropriate where a rule "would only relate to routine or uncontroversial matters") (Attached as Exhibit 4).

[3] ACUS 2024–6, *supra* note 2, at 5; *see* also Todd Garvey, Cong. Research Serv., R41546, *A Brief Overview of Rulemaking and Judicial Review* 4 (Mar. 27, 2017), https://www.congress.gov/crs-product/R41546 (noting "even a single adverse comment" is sufficient to withdraw a direct final rule) (Attached as Exhibit 5).

undoing or revising that action.'" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).

While the APA creates exceptions to notice and comment rulemaking, none are applicable here. The APA provides an exception "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B); *see also id.* § 553(d)(3) (exempting a substantive rule from publication or service requirements "for good cause found and published with the rule."). The good cause exception is "narrowly construed and only reluctantly countenanced," *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012), and "courts must carefully scrutinize the agency's justification for invoking the 'good cause' exception." *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19 (D.D.C. 2010). It is not a tool for agencies to "circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." *N.J. Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)). Instead, the good cause exception is typically utilized "in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare." *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 72 F.4th 1324, 1339–40 (D.C. Cir. 2023).

Here, DOE does not articulate a good cause finding under the APA. As a threshold matter, the APA calls for a determination that the notice and comment process is "unnecessary." 5 U.S.C. § 553(b)(B).[4] DOE makes no such claim, much less provide any support for it. Moreover, the "unnecessary" prong of the good cause exception is "confined to those situations in which the administrative rule is a *routine* determination, *insignificant* in nature and impact, and *inconsequential* to the industry and to the public." *Mack Trucks*, 682 F.3d at 94 (citing *Util. Solid Waste Activities Grp. v. EPA,* 236 F.3d. 749, 755 (D.C. Cir. 2001)) (emphasis added).[5] As this letter demonstrates, this rescission is plainly not an insignificant or merely routine change, and it is of great consequence to the public. DOE is substantively altering its nondiscrimination regulations to eliminate a regulation that for several decades has paved the way for women's athletic participation in sports from which they would otherwise have been utterly excluded. And by eliminating the definition of contact sports, it invites a vast expansion of single-sex athletic

[4] *See also* ACUS 2024–6, *supra* note 2, at 4 (Direct final rulemaking is only appropriate where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking" and "[c]oncludes that the rule is unlikely to elicit any significant adverse comments.").

[5] *See also* Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 Stan. L. Rev. 237, 244 (2021) (APA legislative history clarified the meaning of "unnecessary" as instances involving "minor or merely technical amendment") (Attached as Exhibit 6); U.S. Dep't of Just., *Attorney General's Manual on the Administrative Procedure Act*, FSU Coll. of L. (1947), https://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/1947iii.html ("'Unnecessary' refers to the issuance of a minor rule or amendment in which the public is not particularly interested.") (Attached as Exhibit 7).

teams and casts into question decades of guidance upon which recipients have relied in structuring their athletic programs.

The "unnecessary" prong may also apply "when the agency lacks discretion regarding the substance of the rule."[6] As a threshold matter, it is the province of the judicial branch, not the executive, "to say what the law is." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (*quoting Marbury v. Madison*, 5 U.S. 107, 177 (1803)). But even where an agency claims a rescission is necessary to conform to current legal standards—as DOE attempts to do here by asserting this rescission "aligns the rule with Presidential direction" as set forth in executive orders, DFR, 90 Fed. Reg. at 20,786—public comment is important, for example to ensure that the agency action is not arbitrary and capricious for failure to consider "serious reliance interests," *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009), or "important aspect[s] of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). An agency thus "cannot simply brand [a prior action] illegal and move on." *Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 475 (5th Cir. 2024) (finding DOE was required to consider alternatives to repealing a purportedly "invalid" rule *in toto*).

It would also not be "impracticable" for DOE to engage in notice and comment in this instance. The impracticability exception may apply where an agency "finds that due and timely execution of its functions would be impeded by the notice otherwise required [by the APA]." *Util. Solid Waste Activities Grp.*, 236 F.3d at 754. However, impracticability "is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.,* 894 F.3d 95, 114 (2d Cir. 2018); *see also Mack Trucks*, 682 F.3d at 93 (collecting cases). DOE has not articulated and the undersigned are not aware of any emergency situation or imminent safety threat that would justify rescinding an athletics regulation that has been in effect for decades.

Lastly, the regular notice and comment procedures are not "contrary to the public interest" here. This exception "is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest." *Mack Trucks*, 682 F.3d at 95. For example, it would be contrary to the public interest to undertake notice and comment where "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent." *See Util. Solid Waste Activities Grp*., 236 F.3d at 755. Here, providing the public the opportunity to review and comment in a robust process in fact furthers the public interest in light of the longstanding critical protections afforded by Title IX. And DOE provides no information showing that adequate advance notice of changes to athletics regulations would catalyze unlawful action against the public interest.

[6] ACUS 2024–6, *supra* note 2, at 2 (*citing Metzenbaum v. Fed. Energy Regul. Comm'n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (Notice and comment were not required for the agency's "nondiscretionary acts required by [statute].")).

Nowhere in the Federal Register notice does DOE invoke any of the remaining exceptions to notice and comment rulemaking,[7] and agency action must be evaluated "solely by the grounds invoked by the agency." *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947).

B. DOE Impermissibly Attempts to Raise the Standard for "Significant Adverse Comments."

Next, the DFR violates the APA because DOE attempts to impermissibly raise the bar for a "significant adverse comment" that would require the agency to withdraw the DFR. DOE mistakenly defines significant adverse comments as "ones which oppose the rule and raise, alone or in combination, a serious enough issue related to *each of the independent grounds* for the rule that a substantive response is required." *See* DFR, 90 Fed. Reg. at 20,786 (emphasis added). But DOE's attempt to apply a more exacting standard to the public's comments is inconsistent with widely accepted legal interpretations and longstanding agency practice.[8] Instead, the agency's unjustified heightened requirements serve to impose an extra barrier to meaningful public participation in this rulemaking.

According to ACUS, "an agency should consider *any comment* received during direct final rulemaking to be a significant adverse comment if the comment explains why: (a) [t]he rule would be inappropriate, including challenges to the rule's underlying premise or approach; or (b) [t]he rule would be ineffective or unacceptable without a change."[9] Unlike this DFR, prior direct final rules advanced by DOE committed to responding to "adverse comments" or "significant adverse comments" without qualification.[10]

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[7] *See* 5 U.S.C. §§ 553(a)(1) (exception for "a military or foreign affairs function of the United States"); 553(a)(2) (exception for "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"); 553(b)(A) (exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

[8] For example, in notice-and-comment rulemaking—where agencies have an obligation to respond to "significant comments received during the period for public comment," *Perez*, 575 U.S. at 96, this has been interpreted to include "comments that can be thought to challenge a fundamental premise underlying the proposed agency decision," *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (internal quotation marks omitted), or those which "raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." *City of Portland v. EPA.*, 507 F.3d 706, 715 (D.C. Cir. 2007) (emphasis omitted).

[9] ACUS 2024–6, *supra* note 2, at 5 (emphasis added).

[10] *See, e.g.,* Implementation of OMB Guidance on Drug-Free Workplace Requirements, 75 Fed. Reg. 39,443, 39,444 (July 9, 2010) ("Accordingly, we find that the solicitation of public comments on this direct final rule is unnecessary and that 'good cause' exists under 5 U.S.C. § 553(b)(B) and 553(d) to make this rule effective . . . without further action, unless we receive adverse comment[.]"); Defense Priorities and Allocations System, 73 Fed. Reg. 10,980, 10,981 (Feb. 29, 2008) ("The direct final rule will be effective . . . unless significant adverse comments are received[.]"); Collection of Claims Owed the United States, 68 Fed. Reg. 48,531, 48,532 (Aug. 14, 2003) ("This rule will be effective . . . without further notice unless we receive significant adverse comment[.] If DOE receives such an adverse comment on one or more distinct amendments, paragraphs, or sections of this direct final rule, DOE will

The heightened standard for adverse comments that the DFR articulates also deviates from the standard routinely applied by DOE and other agencies. For example, the statutory requirements for DOE Energy Conservation direct final rules instruct that the Secretary "shall withdraw the direct final rule if [] the Secretary receives 1 or more adverse public comments relating to the direct final rule" and determines that the comments provide a reasonable basis for withdrawal. 42 U.S.C. § 6295(p)(4)(C)(i). For the Environmental Protection Agency's direct final rulemaking on significant new uses for chemical substances, the agency's regulations state that it will withdraw a direct final rule "[i]f notice is received within 30 days after the date of publication that someone wishes to submit adverse or critical comments[.]" 40 C.F.R. § 721.170(d)(4)(i)(B). And the Federal Aviation Administration's regulations likewise provide: "[if] we receive an adverse comment, we will either publish a document withdrawing the direct final rule before it becomes effective" and may issue a notice of proposed rulemaking, or may proceed by other means permissible under the APA. 14 C.F.R. § 11.13. These agencies' rules and practices demonstrate that DOE's threshold for "significant adverse comments" is artificially heightened in contrast with established interpretations that welcome public input.[11]

C. DOE Does Not Cite Adequate Legal Authority for the DFR.

The DFR also does not provide adequate "reference to the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2); *cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683–84 (2020) (finding interim final rule satisfied this requirement where the agency's request for comments "detailed [its] view that they had legal authority" to promulgate exemptions under two statutes). As an initial matter, Executive Order Number 12,250, *Leadership and Coordination of Nondiscrimination Laws*, which was signed 45 years ago in 1980, delegates authority to the Attorney General to "coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions" including Title IX of the Education Amendments of 1972. Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250 § 1–2 (Nov. 2, 1980). But the DFR does not mention any involvement by the Department of Justice or Attorney General in the rescission of the Title IX regulation at issue here. Furthermore, to the extent DOE provides any reference to legal authority for its rescissions, it cites only the Sports Ban EO, which as discussed *infra* at Section (III)(B), is itself contrary to law and unconstitutional.

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publish a timely withdrawal in the Federal Register indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment.").

[11] In another deviation from established notice-and-comment practices that facilitate public participation, DOE is not contemporaneously publishing the public comments it has received in response to the DFR. *Compare* Dep't of Energy, *Nondiscrimination on the Basis of Sex in Sports Programs Arising out of Federal Financial Assistance,* Regulations.gov, https://www.regulations.gov/document/DOE-HQ-2025-0016-0001 (1,833 comments received and 0 comments publicly posted as of 8:00 PM on June 13, 2025), *with* Dep't of Justice, *Withdrawing the Attorney General's Delegation of Authority,* Regulations.gov, https://www.regulations.gov/document/DOJ-OAG-2025-0003-0001 (11,868 comments received and 11,826 comments publicly posted as of 8:00 PM on June 13, 2025).

D. DOE Must Rescind the DFR After Receiving This Significant Adverse Comment.

Lastly, once DOE receives a significant adverse comment, such as ours, DOE must withdraw the direct final rule. Failure to withdraw the rule would be contrary to the APA's requirement that the agency "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments." 5 U.S.C. § 553(c); *see also Perez*, 575 U.S. at 96 ("An agency must consider and respond to significant comments received during the period for public comment."); *cf. Little Sisters of the Poor*, 591 U.S. at 686 (Finding interim final rule satisfied APA § 553(c) comment requirement where agency "requested and encouraged public comments on all matters addressed in the rules" (cleaned up)).[12]

Here, DOE states that in response to significant adverse comments it will either withdraw the rule or "issu[e] a new direct final rule" that responds to the comments. DFR, 90 Fed. Reg. at 20,786. But that is not the proper procedure. A significant adverse comment undermines the agency's finding that there is good cause to bypass notice and comment rulemaking, including through issuing a new direct final rule.[13] DOE had permissible avenues available to it to facilitate expeditious rulemaking if it desired: it could have issued a "companion proposed rule" alongside the direct final rule in order to be well-positioned to proceed with notice-and-comment rulemaking in the event the DFR was withdrawn.[14] However, DOE chose not to do so, and DOE may not undercut the public's right to lawful process required under the APA due to the agency's haste.

III. The DFR Suffers from Serious Issues on the Merits.

A. The DFR Is Arbitrary and Capricious.

The DFR does not withstand review under the APA's arbitrary-and-capricious standard. The "touchstone" of arbitrary-and-capricious review is whether the agency undertook "reasoned decisionmaking." *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061,

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[12] The DOE has already received 1,833 comments on the DFR. Dep't of Energy, *Nondiscrimination on the Basis of Sex in Sports Programs Arising out of Federal Financial Assistance,* Regulations.gov, https://www.regulations.gov/document/DOE-HQ-2025-0016-0001 (last visited June 13, 2025, 8:05 PM ET).

[13] *See* ACUS 2024–6, *supra* note 2, at 2 (noting public engagement may be "especially important" where notice and comment does not occur because it can "help agencies determine whether the good cause exemption is applicable.").

[14] *See* ACUS 2024–6, *supra* note 2, at 6 ("If the agency previously requested comments in a companion proposed rule . . . the agency may proceed with notice-and-comment rulemaking consistent with the proposed rule" after DFR is withdrawn due to significant adverse comments); *see also* Off. of the Fed. Reg., *supra* note 2, at 9 ("If adverse comments are submitted, the agency is required to withdraw the direct final rule before the effective date. The agency may re-start the process by publishing a conventional proposed rule or decide to end the rulemaking process entirely."); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057 (N.D. Cal. 2018) (EPA published a proposed rule alongside its direct final rule; after receiving negative comments, the agency withdrew the direct final rule and proceeded with revisions on the proposed rule track).

1080 (9th Cir. 2019) (quoting *State Farm*, 463 U.S. at 52 (1983)). Under this standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Generalized statements or factual assertions do not suffice to explain agency actions. *Siddiqui v. Holder*, 670 F.3d 736, 744 (7th Cir. 2012) ("Where, as here, the agency uses only generalized language to reject the evidence, we cannot conclude that the decisions rest on proper grounds."); *see also Wages & White Lion Invs., L.L.C. v. U.S. Food & Drug Admin.*, 16 F.4th 1130, 1140 (5th Cir. 2021). An agency must explain its actions when it departs from longstanding policies, and in such cases, is obligated to consider reliance interests. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020). Moreover, should an agency action be challenged in court, a court must not "attempt itself to make up for such deficiencies," *id.*, and must consider only "the grounds that the agency invoked when it took the action," *id.* at 20; *accord SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943); *Beno v. Shalala*, 30 F.3d 1057, 1074 (9th Cir. 1994) ("[W]e cannot infer an agency's reasoning from mere silence or where the agency has failed to address significant objections and alternative proposals.").

As described below, the DFR is arbitrary and capricious in at least three ways. First, it fails to assess any relevant facts, articulate a rational connection between a factual basis and its decision, or provide any legitimate justification for rescinding the Tryout Rule. Second, it does not adequately explain its change in longstanding agency policy. And third, it ignores recipients' significant reliance interests and the harms caused by its abrupt change in policy.

1. DOE Fails to Offer a Reasoned Justification for the Rescission.

The DFR utterly fails to explain this significant policy change. Its cursory attempt to do so gestures vaguely at two justifications: (a) "oppos[ing] male competitive participation in women's sports" in order to promote "safety, fairness, dignity, and truth" for women athletes; and (b) protecting the interests of small businesses and local governments. DFR, 90 Fed. Reg. at 20,786. Neither holds water.

a. Rescinding the Tryout Rule Will Not Promote Safety or Fairness for Women Athletes.

The DFR is arbitrary and capricious because it fails to advance the principal interests it purports to address: promoting safety, dignity, and fairness for women athletes by preventing men's participation in women's sports. *See* DFR, 90 Fed. Reg. at 20,786. The DFR contains no facts or evidence related to the Tryout Rule or to how it might promote safety and fairness—or the more nebulous concepts of "dignity" and "truth"—in women's sports. Nor does DOE offer any evidence that the Tryout Rule has led to significant men's participation in women's sports or diminished women's opportunities to participate in athletics. That is because no such evidence exists. On the contrary, the Tryout Rule has in fact *expanded* opportunities for women and girls in sports, and rescinding it would lead to the opposite result.

The primary function of the Tryout Rule is to ensure that *women* have an opportunity to participate in sports from which they would otherwise be wholly excluded. Though women's athletic participation has dramatically improved in recent years, men's sports teams still vastly outnumber women's teams.[15] According to a recent report by the Women's Sports Foundation, "[a]nnually, boys receive more than 1.13 million more high school sports opportunities than girls, and the gap between high school boys' and girls' participation has not significantly narrowed in the past 20 years. At the college level, in 2017–18 women had 62,236 fewer participation opportunities than men in NCAA sports."[16] Moreover, a report by the National Coalition for Women and Girls in Education found "[w]hen girls and women do have a chance to play sports, they are frequently provided worse facilities, uniforms, and equipment; are supported by inexperienced coaches; receive less support and publicity from their schools; and experience a whole host of other inequities that send a corrosive message to girls and women that they are 'less than' their male peers."[17] It is these forms of persistent inequality—and not the imagined threat of men joining women's teams—that are the principal remaining barriers to women's equal participation in athletics.

Moreover, the Tryout Rule has provided an important backstop to Title IX's longstanding interpretation by agencies and courts, under which recipients are not required to create a parallel team for each sex in each sport, or to achieve exact proportionality. *See* 1979 Policy Interpretation, 44 Fed. Reg. at 71,418. Rather, the statute requires "effective accommodation" of the interests of athletes regardless of sex—a test that can be satisfied in a variety of ways.[18] Recipients are therefore not ultimately required to form a team for members of the excluded sex except where, among other factors, "[t]here is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team." *See* 1979 Policy Interpretation, 44 Fed. Reg. at 71,418. But, crucially, the portion of the regulation slated for rescission has required members of the excluded sex to have an opportunity to at least *try out* to play a specific non-contact sport, regardless of whether there is sufficient interest to form a parallel single-sex team.[19] Girls who try out and earn a spot

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[15] sportanddev.org, *How Title IX Changed the Landscape of Sports* (July 29, 2022), https://www.sportanddev.org/latest/news/how-title-ix-changed-landscape-sports (Attached as Exhibit 8).

[16] Women's Sports Found., *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (2020), https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women (Attached as Exhibit 9).

[17] Elizabeth Tang et al., Nat'l Coal. for Women and Girls in Educ., *Title IX at 50*, at 33 (June 2022), https://nwlc.org/wp-content/uploads/2022/06/NCWGE-Title-IX-At-50-6.2.22-vF.pdf (Attached as Exhibit 10).

[18] *See, e.g.*, 2003 Clarification (Describing three-part test for effective accommodation, and clarifying that "each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored"); 1996 Clarification (Discussing three-part test and clarifying that "institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes").

[19] The Tryout Rule also does not *preclude* allowing girls to try out for or participate on contact sports teams; rather, it creates an exception from the requirement that they be permitted to try out in such

on the existing team enjoy the opportunity to participate in a sport that would otherwise have been wholly unavailable to them.

Conversely, the Tryout Rule has had virtually no bearing on men's participation in women's teams, because it only applies where no comparable men's team exists and where men's opportunities to participate have previously been limited. 10 C.F.R. § 1042.450(b). Such situations are rare because there are very few sports for which only a women's team is offered and from which men have been excluded. The Tryout Rule is mostly invoked by women seeking to try out for men's teams, rather than the reverse.[20] But regardless of which sex invokes the Tryout Rule, it serves the salutary purposes of eroding segregation of sports teams based on stereotypical notions of men's and women's different interests and abilities, and ensuring students are not constrained in their choices of available sports by the fact that their interests do not conform to majority preferences. This is entirely consistent with the purpose of Title IX, which was to "root out" gender stereotypes "as thoroughly as possible[.]" 118 Cong. Rec. 5804 (1972) (statement of Sen. Bayh on the day Title IX was enacted).

As to the Sports Ban EO, the reference to it is simply inapt. The targets of the Sports Ban EO are not male athletes, but rather, transgender women and girls—and neither the Tryout Rule nor the athletics regulations more broadly says anything at all about the participation of transgender athletes. Yet, through its reference to the Sports Ban EO and its vague appeal to "dignity and truth," the DFR implies that transgender women and girls, who would be (wrongly) treated as men and boys under the Sports Ban EO, might exploit the Tryout Rule to gain spots on women's teams from which they would otherwise be excluded. However, DOE fails to state this reasoning directly, or otherwise offer any independent factual basis in support of its flawed premise. And even assuming under the DFR's indirect reasoning that some small minority of transgender women, if wrongly treated as male athletes under the Sports Ban EO and thereby

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contexts. *E.H. by & through Herrera v. Valley Christian Acad.*, 616 F. Supp. 3d 1040, 1055 (C.D. Cal. 2022). The elimination of the Tryout Rule means the requirement would no longer exist even for *non-contact* sports.

[20] While there are relatively few reported decisions applying the Tryout Rule, it has largely been invoked to permit girls to try out for boys' teams, rather than the reverse—and many of those cases were ultimately decided on equal protection grounds. *See, e.g.*, *Brenden v. Indep. Sch. Dist. No. 742*, 477 F.2d 1292, 1303 (8th Cir. 1973) (School could not exclude high school girl from its cross-country competition because of her sex; Tryout Rule invoked but case decided on other grounds); *Brenden v. Indep. Sch. Dist. No. 742*, 477 F.2d 1292, 1303 (8th Cir. 1973) (Striking down a high school athletics association rule that prohibited girls from playing non-contact sports where there were no alternative girls' teams on Equal Protection grounds, but citing Title IX); *cf. Hoover v. Meiklejohn*, 430 F. Supp. 164, 172 (D. Colo. 1977) (School that refused to allow a female student to play school soccer violated her right to equal protection because the school did not have a separate women's team). The lone reported case in which male athletes invoked the Tryout Rule and secured the right to try out, which involved two high school boys who wished to try out for their school's all-female dance team, was also ultimately decided on equal protection grounds. *D.M. & Z.G. v. Minn. State High Sch. League*, 917 F.3d 994 (8th Cir. 2019); *see also Kleczek v. Rhode Island Interscholastic League, Inc.*, 768 F. Supp. 951 (D.R.I. 1991) (Male plaintiff was unlikely to succeed on his Title IX claim that he be allowed to play on the girls' field hockey team because the evidence showed that "only the female sex has had limited athletic opportunities at the high school.").

excluded from women's teams, might then seek to join women's teams under the Tryout Rule, the DFR fails to explain how closing this avenue for their participation would justify eliminating the longstanding benefits for the far greater number of cisgender women and girls who availed themselves of the Rule to try out for boys' teams. Nor does it address or attempt to justify the underlying categorical exclusion of transgender women and girls from women's sports as a whole.

Contrary to DOE's baseless and flimsy assertion, rescinding the Tryout Rule will in fact *limit* opportunities and undermine fairness for women in sports. It is arbitrary and capricious for an agency to adopt a position contradicted by the available evidence. *See State Farm*, 463 U.S. at 43. Moreover, because the DFR examines no data and finds no facts, it definitionally fails to draw a "rational connection" between those (nonexistent) facts and its rescission of the Tryout Rule. Consequently, the DFR falls short of the standard of reasonableness the APA requires. *See Penick Corp., Inc. v. Drug Enf't Admin.*, 491 F.3d 483, 488 (D.C. Cir. 2007) (noting that agency action is arbitrary and capricious if it does not, "[a]t a minimum," consider relevant data and rationally connect facts to agency decision).

b. There Is No Basis for the Agency's Claim That the Tryout Rule Imposes a Burden on Local Government or Small Businesses.

The DFR further claims that the Tryout Rule "impos[es] a burden on local governments and small businesses who are in the best position to determine the needs of their community and constituents." DFR, 90 Fed. Reg. at 20,786. However, DOE again offers no facts, evidence, or explanation whatsoever as to how small businesses are impacted by the regulation, and there is no basis for this claim. Small businesses are not typically considered "education program[s]" for purposes of Title IX, nor are small businesses recipients of federal funds. They are accordingly not bound by the Tryout Rule, and it is therefore unclear how, if at all, they could be burdened by its application—or unburdened by its rescission. This does not meet the APA's requirements for reasoned decision-making. *State Farm*, 463 U.S. at 43; *see also Transp. Trades Dep't, AFL-CIO v. Nat'l Mediation Bd.*, 530 F. Supp. 3d 64, 72–73 (D.D.C. 2021) (Agency action is arbitrary and capricious where it lacks any factual basis and "rational connection between the facts found and the choice made").

Having omitted any such evidence or explanation, DOE proceeds to solicit them from public commenters, inviting comments which elucidate "the prior rule's effect on small business, entrepreneurship and private enterprise." DFR, 90 Fed. Reg. at 20,786. But "[i]t is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later." *Texas v. Biden*, 10 F.4th 538, 558–59 (5th Cir. 2021). The reasoning supporting an action must be "articulated by the agency itself." *State Farm*, 463 U.S. at 50. DOE may not rescind the Tryout Rule and then begin searching for evidence from others to justify its rescission. Because the DFR articulated no "contemporaneous explanations" of how the Tryout Rule impacts small businesses, any evidence subsequently generated by this fact-fishing expedition would be an "impermissible post hoc rationalization" upon which DOE cannot rely to maintain the DFR. *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 857–58 (5th Cir.

2022) (citing *Regents*, 591 U.S. at 22); *see also Regents*, 591 U.S. at 24 ("The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted.").[21]

The DFR likewise provides no factual basis, much less the "satisfactory explanation" the APA requires, to support the assertion that the Tryout Rule burdens local governments. *See State Farm,* 463 U.S. at 43. DOE's claim that this rescission is motivated by respect for local government is also belied by recent efforts by ED and U.S. DOJ to investigate state and local governments with policies inclusive of transgender student athletes, apparently taking the position that such policies violate Title IX or the Equal Protection Clause per se in light of the President's Executive Orders.[22] In light of the flurry of announced investigations, DOE's justification about respect for local government control rings hollow.

2. DOE Fails to Explain Its Abrupt Change in Position.

The DFR provides no explanation for the abandonment of the longstanding Tryout Rule and is therefore arbitrary and capricious. "When an agency changes its existing position, it . . . must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citation modified); *see also id.* at 222 (Explaining that an "unexplained inconsistency in agency policy is a reason for holding an [action] to be an arbitrary-and-capricious change from agency practice" (citation modified)). Agencies "may not . . . depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *accord State Farm*, 463 U.S. at 56 ("While the agency is entitled to change its view on [a policy], it is obligated to explain its reasons for doing so.").

But by abruptly breaking with decades of DOE policy, the DFR does just that. The Tryout Rule has been in effect since adoption of the Title IX Common Rule in 2001. The DFR reverses decades of DOE policy with a mere two sentences' justification, and offers no explanation or reasoning as to how DOE arrived at this decision or why it is rescinding a policy that *advances* the very purpose set forth in the DFR, namely, fairness and opportunity for women in sports. The APA forbids this. *See, e.g.*, *Wis. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (Holding agency's unexplained "abrupt departure" from past policy arbitrary and capricious).

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[21] Of course, in the usual notice-and-comment process—which DOE has unlawfully forgone by using a DFR—agencies must solicit and respond to input from the public. But an agency may not issue a DFR without evidence or justification, and then rely on the public to adduce supporting evidence for the agency's action *post-hoc*.

[22] *See* Off. Of Pub. Affairs, U.S. Dep't of Justice*, U.S. Department of Education and U.S. Department of Justice Announce Title IX Special Investigations Team* (Apr. 4, 2025), https://www.justice.gov/opa/pr/us-department-education-and-us-department-justice-announce-title-ix-special-investigations (Attached as Exhibit 11); Dep't of Educ. Office for Civil Rts, "Dear Colleague" Letter from Acting Assistant Sec'y Craig Trainor (Feb. 4, 2025), https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl-109477.pdf (Attached as Exhibit 12).

As to the DFR's reference to the Sports Ban EO, the policies embodied in that order further represent a sharp departure from prior agency positions, with no acknowledgement or explanation of the change. Following the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), which recognized that Title VII's prohibition on sex discrimination encompasses discrimination based on gender identity, U.S. DOJ issued a memorandum directing all federal agencies to enforce Title IX consistent with that holding.[23] U.S. DOJ has rescinded that guidance in the wake of the President's Executive Orders.[24] The DFR does the same, but *sub silentio*—without acknowledgement of or explanation for the change. Its mere throwaway reference to the Sports Ban EO—without any independent reasoning or analysis, and without accounting for the potential impact on students, recipients, or States—is a woefully inadequate basis for such a dramatic reversal. *See State Farm*, 463 U.S. at 43. Further, the Sports Ban EO itself contains no evidence or reasoning that DOE could incorporate by reference to explain or justify this departure. *See* Sports Ban EO, Exec. Order No. 14,201.

3. The DFR Fails to Address Reliance Interests.

The DFR further fails to take into account important aspects of the problem—reliance interests by recipients. "When an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Regents*, 591 U.S. at 30 (citation modified). In particular, an agency must assess States' reliance interests on federal programs or policies and weigh those interests against competing policy concerns. *Id.*; *see also State Farm*, 463 U.S. at 43 (ignoring reliance interests represents a "fail[ure] to consider an important aspect of the problem" and renders an agency action arbitrary and capricious); *Texas v. Biden*, 20 F.4th at 988–90 (5th Cir. 2021) (agency's failure to assess States' reliance on the rescinded policy was "fatal"), *rev'd and remanded on other grounds*, 597 U.S. 785 (2022). DOE utterly failed to assess or even acknowledge recipients' reliance on the longstanding Tryout Rule, let alone weigh those reliance interests against others. This renders its DFR arbitrary and capricious. *Regents*, 591 U.S. at 30.

The impacts of the rescission of the Tryout Rule on affected recipient institutions would be significant. The Tryout Rule has been the law of the land since 2001. Recipients of federal funding, including state institutions, have organized their athletic programs and expanded considerable resources in reliance on the longstanding rule, and the agencies' interpretation of the rule. DOE likewise fails to acknowledge the existence of or explain the rescission's potential

[23] *See* Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021) ("[T]he Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity."); Memorandum from Pamela S. Karlan, Principal Deputy Solic. Gen., Civ. Rts. Div., U.S. Dep't of Just. on Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://web.archive.org/web/20240421221643/https://www.justice.gov/crt/page/file/1383026/dl?inline.

[24] *See* Memorandum from The Acting Assoc. Att'y General to The Civ. Rts. Div. (Feb. 12, 2025), https://www.justice.gov/crt/media/1389946/dl?inline (Attached as Exhibit 13).

impact on the many related sub-regulatory guidance documents and interpretive rules issued by the Education Department over decades,[25] many of which have been given deference by courts. *See Cohen v. Brown Univ.*, 991 F.2d 888, 896–97 (1st Cir. 1993).

The rescission of the Tryout Rule creates considerable uncertainty as to which of these longstanding guidance documents remains in effect. For example, the DFR rescinds the sentence which defines "contact sports." But other requirements of Title IX turn on this definition. For example, this regulation and its interpretation by the Education Department establish different standards between contact and non-contact sports for when a recipient *must* institute a single-sex team for members of the excluded sex. *See* 1979 Policy Interpretation, 44 Fed. Reg. at 71,418. For contact sports, a recipient must establish a separate team if (1) the opportunities for members of the excluded sex have historically been limited; and (2) there is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team. However, for non-contact sports, separate teams are required if the first two factors are met *and* "members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such team if selected." *Id.* This longstanding policy interpretation is dependent in part on the provision of the regulation that is struck in the DFR, defining "contact sports" and mandating tryout opportunities. DOE's elimination of this provision will lead to uncertainty as to when establishment of separate teams is required or permissible. DOE **"**failed to consider [this] important aspect of the problem" or address the problems its abrupt revocation of this longstanding rule will create, rendering the DFR arbitrary and capricious. *See State Farm*, 463 U.S. at 43; *Regents*, 591 U.S. at 30.

4. The DFR Fails to Consider the Impact on Female Athletes of Rescinding the Tryout Rule.

The DFR further fails to consider the impact that recission of the Tryout Rule will have on female athletes—whether cisgender or transgender. It is well documented that sports participation confers a broad range of significant health, social, academic, and other benefits. These benefits extend far beyond school and encompass both immediate and long-term advantages, including improved academic outcomes like test scores and graduation rates, increased confidence, self-esteem, and body image, and lower levels of depression and risk-taking behavior.[26] Further, "[t]he lessons of teamwork, leadership, and confidence that girls and women gain from participating in athletics can help them after graduation as well as during school."[27] An impressive 96% of female business executives played sports, with the majority

[25] Relevant ED Guidance includes: 2003 Clarification; 1979 Policy Interpretation; 1996 Clarification.

[26] Tang et al., *supra* note 17, at 34.

[27] Nat'l Coal. for Women & Girls in Educ., *Title IX and Athletics* 11 (2012), https://www.ncwge.org/TitleIX40/Athletics.pdf (Attached as Exhibit 14).

saying that lessons learned on the playing field contributed to their success.[28] Former female athletes also earn an average of 7% more in annual wages than their non-athlete peers.[29] Further, "[b]ecause girls of color often have limited out-of-school sports opportunities in their communities and face other challenges to participation (e.g., financial and transportation needs), they are more likely to participate in sports through school than through private organizations. This makes it even more critical that they have equal access to school-sponsored sports to enable them to be physically active."[30]

The DFR fails utterly to address the potential impact of rescinding the Tryout Rule on girls' and women's overall athletic opportunities, which as previously discussed, will decrease, rather than increase, those opportunities and the multiple benefits that flow from them.

Moreover, the DFR fails to account for the impacts of achieving its stated purpose to end "male competitive participation in women's sports," DFR, 90 Fed. Reg. at 20,786—by which it means depriving transgender women and girls the chance to play on female athletic teams. In addition to being discriminatory, as discussed further below, the DFR fails to address the significant harms such exclusion causes to transgender students.[31] Discrimination against transgender youth—including denying them the opportunity to participate in extracurricular activities consistent with their gender identity—can have serious health and academic consequences. LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.[32] Students who report such negative experiences in grades K–12 are more likely than other students to be under serious psychological distress, to experience homelessness, and to have attempted suicide.[33] The impacts on academic achievement are just as stark. A 2019 survey showed that LGBTQ students who had experienced discriminatory policies

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[28] Barbara Kotschwar, Peterson Inst. for Int'l Econ., *Women, Sports, and Development: Does it Pay to Let Girls Play?* 9 (2014), https://www.piie.com/sites/default/files/publications/pb/pb14-8.pdf (Attached as Exhibit 15).

[29] *Id.* at 2.

[30] Nat'l Coal. for Women & Girls in Educ., *Title IX at 45: Title IX and Athletics* 4–5 (2017), https://www.ncwge.org/TitleIX45/Title%20IX%20and%20Athletics.pdf (Attached as Exhibit 16).

[31] *See, e.g.,* Toomey et al., Soc'y for Rsch in Child Dev., *Gender-Affirming Policies Support Transgender and Gender Diverse Youth's Health* (Jan. 2022), https://www.srcd.org/sites/default/files/resources/SRCD%20SOTE-Gender%20Affirming%20Policies%202022.pdf (Attached as Exhibit 17).

[32] Joseph G. Kosciw et al., Gay, Lesbian, & Straight Educ. Network, *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xviii (2016), https://www.glsen.org/sites/default/files/2020-01/GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf (Attached as Exhibit 18).

[33] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 131–35, Nat'l Ctr. for Transgender Equal. (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (Attached as Exhibit 19).

and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.[34] Discriminatory school climates have also been found to exacerbate absenteeism. In the month before a 2019 survey, LGBTQ students who had experienced discrimination in their schools based on their sexual orientation or gender identity were almost three times as likely (44.1% versus 16.4%) to have missed school because they felt unsafe or uncomfortable.[35]

Conversely, policies that allow transgender students to access facilities and activities consistent with their gender identity create school climates that enhance students' well-being and facilitate their ability to learn.[36] Studies have shown that an affirming school environment is critical to supporting transgender young people.[37] For example, transgender students permitted to live consistently with their gender identity have mental health outcomes comparable to their cisgender peers.[38] And for LGBTQ students in particular, sports participation has been linked to higher levels of self-esteem and lower levels of depression.[39]

Forcing transgender girls to compete only on boys' teams functionally deprives them of the ability to participate in an affirming environment. For many, it will mean they will forgo the chance to compete at all. *See B.P.J. v. W.V. State Bd. of Educ.*, 98 F.4th 542, 564 (4th Cir. 2024) (Observing that forcing transgender girls to choose "between not participating in sports and participating only on boys' teams is no real choice at all"), *petition for cert. filed*, No. 24-43. The DFR does not mention, much less grapple with, the immediate or longer-term consequences of depriving a minority category of students of the multiple benefits of participating in athletics or of subjecting them to exclusionary policies. The DFR's cavalier **"**fail[ure] to consider [this] important aspect of the problem" is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

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[34] *Id.* at 45, 48; *see also* Emily A. Greytak et al., Gay, Lesbian, & Straight Educ. Network, *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* xi, 25, 27 fig. 17 (2009), https://www.glsen.org/sites/default/files/2020-01/Harsh_Realities_The_Experiences_of_Transgender_Youth_2009.pdf (Showing that more frequently harassed transgender students had significantly lower grade point averages than other transgender students) (Attached as Exhibit 20).

[35] Kosciw et al., *supra* note 32.

[36] *See, e.g.*, Br. of Amici Curiae Sch. Administration from Thirty-One States and D.C. in Supp. of Resp't at 3–4, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055 [hereinafter "Br. of Amici Curiae Sch. Administration"].

[37] *See, e.g.,* Toomey, *supra* note 31.

[38] *See* Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 Pediatrics 3, 5–7 (2016), https://pubmed.ncbi.nlm.nih.gov/26921285/ (Attached as Exhibit 21); Br. of Amici Curiae Sch. Administration at 4, Gloucester Cnty. Sch. Bd., 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

[39] Caitlin M. Clark et al., Gay, Lesbian, & Straight Educ. Network, *LGBTQ Students and School Sports Participation: Research Brief* 8 (2021), https://www.glsen.org/sites/default/files/2022-02/LGBTQ-Students-and-School-Sports-Participation-Research-Brief.pdf (Attached as Exhibit 22).

B. The DFR is Contrary to Law and to the Constitutional Guarantee of Equal Protection.

In addition to being arbitrary and capricious, the DFR is contrary to law and the Constitution, in violation of the APA. 5 U.S.C. § 706(2)(A)–(B) (agency action must not be "contrary to law" or "contrary to constitutional right"). The DFR violates both of these standards.

First, to the extent that the DFR is intended to further the Sports Ban EO's exclusionary goal, it flatly violates Title IX. The Sports Ban EO conditions federal funding on the blanket exclusion of transgender women and girls from school-sponsored athletic programs consistent with their gender identity—a facially sex-based exclusion. As the Supreme Court has repeatedly affirmed, Title IX must be given "a sweep as broad as its language." *North Haven Bd. of Ed. v. Bell,* 456 U.S. 512, 521 (1982); *accord Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 175 (2005). As the U.S. DOJ and ED previously recognized, the reasoning of *Bostock*, 590 U.S. 644 (2020), which held discrimination on the basis of transgender status constitutes discrimination on the basis of sex under Title VII, applies equally in the context of Title IX.[40] And Title VII and Title IX have long been broadly construed as coterminous with respect to their substantive prohibitions on discrimination. *See* Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. at 32,637; *Franklin v. Gwinnett Cnty. Pub. Sch*., 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C*., 482 F.3d 686, 695 (4th Cir. 2007). Accordingly, numerous courts have held that exclusionary policies like the Sports Ban EO violate Title IX. *See Hecox v. Little*, 104 F. 4th 1061 (9th Cir. 2024); *A.C. v. Metropolitan Sch. District of Martinsville*, 75 F.4th 760, 768–69 (7th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); *but see Adams ex rel. Kasper v. School Bd. of St. Johns Cnty*, 57 F.4th 791 (11th Cir. 2022) (en banc).

Furthermore, the DFR is contrary to the Constitutional guarantee of Equal Protection in at least two independent ways: (1) it seeks to bolster sex-separated teams based on impermissible stereotypes about men and women; and (2) it relies on an executive order that draws facial sex-

[40] Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. at 32,637; Memorandum from Pamela S. Karlan, *supra* note 23; *see also* Joint Letter from U.S. Dep't of Educ. and DOJ (May 13, 2016), https://www.justice.gov/opa/file/850986/dl (Title IX "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status") (Attached as Exhibit 23); U.S. Dep't of Educ, Off. For Civ. Rts., *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf ("All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.") (Attached as Exhibit 24).

based classifications without demonstrating an adequate justification, and is motivated by a "bare desire to harm" transgender individuals. *See Romer v. Evans*, 517 U.S. at 634.

The DOE offers no factual support for its assertion that the elimination of the Tryout Rule serves the interest in addressing "differences between the sexes which are grounded in fundamental and incontrovertible reality." As discussed above, this "incontrovertible reality" is in fact controverted by the evidence of numerous girls who have successfully tried out for and competed on men's sports teams in the many decades since the rule was first promulgated, and who would have otherwise been denied that opportunity. But even in areas where there might be aggregate differences between men's and women's skills or abilities, "generalizations about 'the way women are,' or estimates of what is appropriate for *most women,* no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *See United States v. Virginia*, 518 US. 515, 550 (1996). It is precisely such circumstances—where an individual has the talent and capacity to compete on a cross-sex team—that the Tryout Rule is intended to address.[41] In removing the safety valve that allows for such participation to take place, in reliance on categorical generalizations about sex-differences, the DFR runs afoul of the constitutional guarantee of equal protection.

Moreover, the exclusion of transgender students pursuant to the Sports Ban EO draws facial classifications based on (1) sex, because the determination of how to enforce it, and against whom, cannot be made but for considering the sex—defined as sex assigned at birth—of the individuals involved on the teams in question; (2) transgender status, because it facially targets transgender individuals; and (3) both sex and transgender status, because it singles out transgender women in particular for different and worse treatment without adequate justification. Any of these criteria, alone, would subject the Sports Ban EO to heightened scrutiny, which it cannot survive.[42]

The DFR's purported appeal to "safety, fairness, dignity, and truth" as a basis for its exclusionary goal is equally flawed. While promoting safety and fairness—along with the more general values of "dignity" and "truth"—are undoubtedly important interests, the DFR does not

[41] Moreover, the DFR does not explain how its assertion about "fundamental" and "incontrovertible" differences between the sexes can be squared with the remainder of the regulation, embodied in subsection (a), which still treats mixed participation as the default rule outside of the context of contact and competitive team sports. Eliminating the Tryout Rule does not further the purported purpose in recognizing such presumed sex differences because the DFR does not alter the underlying presumption of mixed-competition sports teams.

[42] *See Doe v. Horne*, 115 F.4th 1083, 1109 (9th Cir. 2024); *Hecox v. Little*, 104 F.4th 1061, 1079 (9th Cir. 2024) (Idaho law categorically prohibiting transgender women and girls from participation on female teams violated equal protection); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 614 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (School board policy of denying access to restroom and refusing to amend school records consistent with gender identity violated equal protection); *Kadel v. Folwell*, 100 F.4th 122, 143 (4th Cir. 2024) (exclusion of gender-affirming care from state employee and Medicaid program was prohibited sex discrimination under the Equal Protection clause); *Fowler v. Stitt*, 104 F.4th 770, 793–94 (10th Cir. 2024) (state ban on sex-designation amendments on birth certificates violated equal protection); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (discharge of state employee based on gender identity violated equal protection).

explain or provide any evidence of how the rescission of the Tryout Rule would advance any of those goals. For example, as to "fairness," the DFR provides zero evidence that the Tryout Rule has in any way restricted women's athletic opportunities, or that rescinding it will improve opportunities. On the contrary, as previously discussed, the Tryout Rule has been a crucial tool to further women's equal athletic opportunities; its rescission will have the opposite result. What is more, even assuming some transgender women athletes had some competitive advantage in some cases, which the DFR does not even attempt to demonstrate, that would be insufficient to justify their categorical exclusion across all sports, all ages, and all levels of competition. *See Hecox v. Little*, 104 F.4th 1061, 1083–84 (9th Cir. 2024), *as amended* (June 14, 2024) ("[T]he Act's sweeping prohibition on transgender female athletes in Idaho—encompassing all students, regardless of whether they have gone through puberty or hormone therapy, without any evidence of transgender athletes displacing female athletes in Idaho, and enforced through a mechanism that subjects all participants in female athletics to the threat of an invasive physical examination—is likely too unrelated to the State's legitimate objectives to satisfy heightened scrutiny.").

The DFR's reference to the Sports Ban EO reveals the ultimate goal in rescinding the Tryout Rule: to "oppose" female transgender athletes' participation in women's sports. DOE does not seek to promote equal opportunities for female athletes, but to exclude and erase transgender women. Such a justification amounts to exclusion for exclusion's sake, and is impermissible per se. *See Virginia*, 518 U.S. at 545 (Rejecting the "notably circular argument" that exclusion of women for purposes of maintaining single-sex education at military training academy). This ultimate exclusionary goal is even more clear when viewed in the context of the spate of Presidential executive orders targeting the transgender population. Those executive orders refer to transgender women as men; attempt to deny the existence of a population of individuals who do, in fact, exist; direct their exclusion from military service; aim to cut off their access to necessary and often life-saving medical care; and generally direct federal agencies to use all of the tools of the federal government to erase their legal existence. *See* Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Exec. Order No. 14,168 (Jan. 20, 2025); Protecting Children from Chemical and Surgical Mutilation, Exec. Order No. 14,187 (Jan. 28, 2025); Ending Radical Indoctrination in K–12 Schooling, Exec. Order No. 14,190 (Jan. 29, 2025); Prioritizing Military Excellence and Readiness, Exec. Order No. 14,183 (Jan. 27, 2025). The Constitution's guarantee of equality "must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *United States v. Windsor*, 570 U.S. 744, 770 (2013) (citing *Dep't of Agric. v. Moreno,* 413 U.S. 528, 534–35 (1973)). The animus behind these executive orders is plain. The Sports Ban EO is unconstitutional, and insofar as the DFR is based upon the Sports Ban EO, it too violates the constitutional guarantee of Equal Protection.

IV. Conclusion

For the reasons stated above, the Signatory States oppose the rescission of the Tryout Rule, a provision of subsection (b) of 10 C.F.R. § 1042.450. Signatory States also oppose DOE's use of a direct final rule on the procedural grounds stated herein. Accordingly, in light of this "significant adverse comment" opposing the basis for the DFR, it must be withdrawn.

Sincerely,

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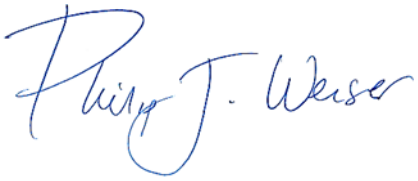

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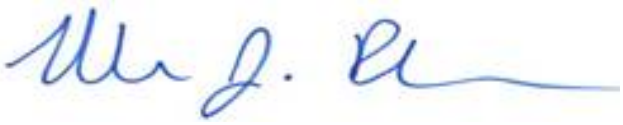

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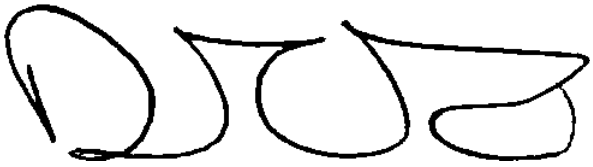

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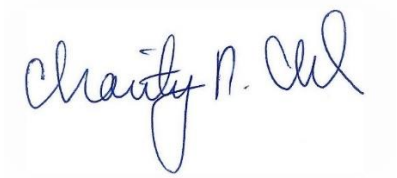

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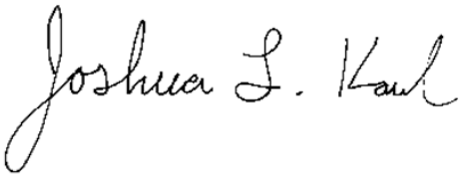

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